In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1268

WALTER KOCHER, PETITIONER

v.

HENRY FOWLER, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B–2) is not as yet reported. The judgment of the district court dismissing the action (Pet. App. B–1) and the oral opinion of the district court denying the motion for preliminary injunction (Pet. App. C–4) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1967. The petition for a writ of certiorari was filed on March 27, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

297–858—68

QUESTION PRESENTED

Whether the district court lacked jurisdiction to entertain an action brought by petitioner, an American importer of Swiss watches, seeking to compel the Commissioner of Customs to refrain from according duty-free entry to watch movements imported from the insular possessions of the United States by petitioner's competitors.

STATUTES INVOLVED

The pertinent provisions of 28 U.S.C. 1340 and 1583 and of the Tariff Schedules of the United States (19 U.S.C. 1202), are set forth in the Appendix *infra*, pp. 9–11.

STATEMENT

General Headnote 3(a) of the Tariff Schedules of the United States, 19 U.S.C. 1202 (App. *infra*, p. 10) provides that articles which are the product of a United States insular possession are exempt from the assessment of customs duties if the value of any foreign materials they contain is not more than 50 percent of their total value. This provision, which was originally enacted in 1954, was intended to stimulate the development of light industry in the possessions. S. Rep. No. 1679, 89th Cong., 2d Sess., p. 2.

In March 1959, the Bureau of Customs determined that "[t]he assembly in the Virgin Islands into completed watch movements of various parts imported separately into that possession in circumstances not constituting an entirety results in articles manufactured or produced in that possession * * *." Accordingly, under General Headnote 3(a), the completed

product was held entitled to free entry into the customs territory of the United States subject to satisfaction of the 50 per cent value requirement. Treasury Decision 54821(2), 94 Treas. Dec. 154.

Petitioner Kocher imports watches and watch movements from Switzerland into the United States. Those articles are subject to customs duties under the Tariff Schedules. Asserting jurisdiction under 28 U.S.C. 1340, petitioner commenced this action in the district court against the Secretary of the Treasury and the Commissioner of Customs, seeking to compel them to annul Treasury Decision 54821(2) and asking a declaration of the unconstitutionality of General Headnote 3(a) of the Tariff Schedules. Essentially, petitioner seeks to compel the Customs authorities to levy the same duties on watches and watch movements imported from the Virgin Islands as are assessed on his importations. (Pet. 6–7).

The district court denied petitioner's request for a preliminary mandatory injunction and dismissed the complaint for the reason, among others, that "[t]he mere fact that" petitioner was "being hurt commercially by competition" from duty-exempt watch movements did "not give him standing to seek a declaration of invalidity of a governmental regulation or practice" (Pet. App. B–1, C–4).

The court of appeals held that the district court lacked jurisdiction over the action and accordingly affirmed its judgment. The court below was "clear that appellant must make his plea" in the Customs Court. (Pet. App. B–6).

ARGUMENT

In the district court petitioner asserted two reasons why the exemption from duty of watches and watch movements from the Virgin Islands was improper: *first,* that Treasury Decision 54821(2), which granted the exemption, was not authorized by Headnote 3(a) of the Tariff Schedules; and *second,* if the exemption was authorized by Congress, it was unconstitutional under the equal protection clause. However, as the court below held, the district court lacked jurisdiction to entertain these attacks on the application of the customs laws. Moreover, petitioner's claim that the exemption for Virgin Island watches and watch movements was not authorized by Congress is particularly inappropriate for review here, since in subsequent amendments to the Tariff Schedules Congress has expressly recognized that watches assembled in the Virgin Islands are entitled to the exemption in Headnote 3(a).

1. Congress has given to the Customs Court "*exclusive* jurisdiction to review on protest the decisions of any collector of customs * * * as to the rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury * * *." (Emphasis supplied.) 28 U.S.C. 1583 (App. *infra,* p. 9). That Congress intended that all challenges to assessments of duty on imports would be heard by the Customs Court is also evident from the fact that it expressly excluded from the jurisdiction of the district courts actions arising under any Act of Congress providing for revenue from imports that are "within the juris-

diction of the Customs Court." 28 U.S.C. 1340 (App. *infra*, p. 9).

The fact that the Customs Court has exclusive jurisdiction of questions relating to rates of duty does not deprive petitioner of any relief to which he is entitled. If there is merit to petitioner's claim that the granting of an exemption from duty to Virgin Island watches or watch movements denies him the equal protection of the law, the Customs Court can afford him adequate relief by declaring that he is not obligated to pay duty on his importations.

Petitioner points, however, to the fact that Congress has not provided an importer with the right to obtain review in the Customs Court of the duties assessed upon merchandise imported by persons other than himself. While this is true, it simply reflects the legislative judgment than an importer should be accorded only the right (conferred by Section 514 of the Tariff Act of 1930, 19 U.S.C. 1514) to protest the assessment of duties on his own importations. Indeed, prior to 1922, no individual had the right to obtain review of the assessment of duties on other than his own importations. In that year, as Section 516 of the Tariff Act of 1922, 42 Stat. 970, now 19 U.S.C. 1516(b), Congress gave *American manufacturers, producers, and wholesalers* the right to challenge in the Customs Court "the rate of duty, if any, imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by [them]."[1] Neither in

[1] In such an action, the importer of the merchandise involved has the right to appear and be heard as a party in interest. 19 U.S.C. 1516(c). In this action, blanket injunctive relief which

the 1922 Act nor in subsequent tariff legislation was any provision made for review at the behest of an *importer* of competing merchandise. The inference is thus clear: Congress has not seen fit to permit such review in any court.[2]

2. At all events, petitioner is not prejudiced by the fact that he is not entitled to compel the imposition of duty on watches and movements from the Virgin Islands. As noted above, if his equal protection argument has merit the Customs Court could relieve him of the burden of paying the duty. And Treasury Decision 54821(2) can no longer be attacked as unauthorized by the Tariff Schedules, for Congress in effect has approved that Decision. In 1966, Congress examined closely the questions sought to be raised in this suit, through its conduct of extensive hearings

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would have been effective against all importers of Virgin Islands watch movements was sought in the absence of any similar protection of their interests.

[2] Contrary to petitioner's assertion, the decision below does not conflict with any decision of this Court or any other court. Insofar as we are aware, no court has ever held that a person in petitioner's situation may invoke the jurisdiction of a district court to challenge the customs duty treatment afforded a competitor's importations. It is true that, as petitioner notes (Pet. pp. 7–8), the Second Circuit reached the merits in *Kreutz* v. *Durning*, 69 F. 2d 802, in which several importers sought to enjoin the assessment of duties on their own merchandise. But the court pointed out that it made "little difference whether with the [district court] we say that the importers had an adequate remedy at law and so may not come into equity; or whether we dispose of their claims on the merits, holding that the statute is valid." 69 F. 2d at 804 (Pet. App. D–3—D–4). The adequate remedy at law to which the district court had referred was an action in the Customs Court. 3 F. Supp. 364, 366.

on the "Dutiable Status of Watches Assembled in Insular Possessions of the United States." Hearing Before the Senate Committee on Finance on H.R. 8436, 89th Cong., 2d Sess. Following that complete re-examination of the watch assembly industry in the insular possessions (and subsequent to the dismissal of this suit by the district court), Congress enacted Pub. L. 89–805, 80 Stat. 1521. By that act, Congress permitted the continued duty-free importation from the possessions of watches and watch movements assembled there from foreign components but amended the Tariff Schedules so as to limit the number of such articles which may be imported duty-free from such areas (App., *infra*, p. 11).[3]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1968.

[3] The quota system has the effect of continuing the economic stimulation the watch assembly industry brings to the possessions, but at the same time avoids a substantial adverse effect on United States watch production. S. Rep. No. 1679, *supra*, pp. 6–7.

APPENDIX

1. The revelant jurisdictional statutes provide as follows:

> 28 U.S.C. 1340:
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> The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.
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> 28 U.S.C. 1583:
>
> The Customs Court shall have exclusive jurisdiction to review on protest the decisions of any collector of customs, including all orders and findings entering into the same, as to the rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury * * *.

2. The Tariff Schedules of the United States, 19 U.S.C. (1964 ed., Supp. II) 1202, provide in pertinent part:[4]

> GENERAL HEADNOTES AND RULES OF INTERPRETATION
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> 1. *Tariff treatment of imported articles.*—
>
> All articles imported into the customs territory of the United States from outside thereof

[4] The exception in General Headnote 3(a) with respect to the provisions of headnote 6 of schedule 7, part 2, subpart E, and those provisions, were added by Pub. L. 89-805, November 10, 1966, 80 Stat. 1521. See text accompanying footnote 3, *supra*.

are subject to duty or exempt therefrom as provided in general headnote 3.

* * * * *

3. *Rates of duty.*—The rates of duty in the "Rate of Duty" columns numbered 1 and 2 of the schedules apply to articles imported into the customs territory of the United States as hereinafter provided in this headnote:

(a) *Products of insular possessions:*

(i) Except as provided in * * * headnote 6 of schedule 7, part 2, subpart E, articles, imported from insular possessions of the United States which are outside the customs territory of the United States are subject to the rates of duty set forth in column numbered 1 of the schedules, except that all such articles the growth or product of any such possession, or manufactured or produced in any such possession from materials the growth, product, or manufacture of any such possession or of the customs territory of the United States, or of both, which do not contain foreign materials to the value of more than 50 percent of their total value, coming to the customs territory of the United States directly from any such possession * * * are exempt from duty.

* * * * *

SCHEDULE 7—SPECIFIED PRODUCTS; MISCELLANEOUS AND NONENUMERATED PRODUCTS

* * * * *

PART 2.—OPTICAL GOODS; SCIENTIFIC AND PROFESSIONAL INSTRUMENTS; WATCHES, CLOCKS, AND TIMING DEVICES; PHOTOGRAPHIC GOODS; MOTION PICTURES; RECORDINGS AND RECORDING MEDIA.

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Subpart E.—Watches, Clocks, and Timing Apparatus.

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Subpart E headnotes:

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6. *Products of Insular Possessions.*—(a) Except as provided in paragraph (b) of this headnote, any article provided for in this subpart which is the product of an insular possession of the United States outside the customs territory of the United States and which contains any foreign component shall be subject to duty—

(i) at the rates set forth in column numbered 1, if the countries of origin of more than 50 percent in value of the foreign components are countries to products of which column numbered 1 rates apply, and

(ii) at the rates set forth in column numbered 2, if the countries of origin of 50 percent or more in value of the foreign components are countries to products of which column numbered 2 rates apply.

(b) If the requirements for free entry set forth in general headnote 3(a) are complied with, watches (provided for in item 715.05) and watch movements (provided for in items 716.08 through 719.—) which are the product of the Virgin Islands, Guam, or American Samoa and which contain any foreign component may be admitted free of duty, but the total quantity of such articles entered free of duty during each calendar year shall not exceed a number equal to 1/9 of the apparent United States consumption of watch movements during the preceding calendar year (as determined by the Tariff Commission), of which total quantity—

(i) not to exceed 87.5 percent shall be the product of the Virgin Islands,

(ii) not to exceed 8.33 percent shall be the product of Guam, and

(iii) not to exceed 4.17 percent shall be the product of American Samoa.

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